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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES DOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RICHARD F. WALSH
Room 1220
53 West Jackson Blvd.
Chicago, Illinois 60604
312-427-6050
Attorney for Petitioner

Pandick Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED

Whether a per se rule should be adopted holding that a narcotics transaction is such an inherently dangerous exigent circumstance as to justifying entry into a dwelling without a warrant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES DOWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, by his attorney, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is as yet unreported and is reproduced in the appendix. The opinion of the district court is unreported and is reproduced in the appendix. The findings and recommendations of the United States Magistrate are unreported and are reproduced in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional provisions involved pursuant to Supreme Court Rule 21.1(f) the following constitutional provision is set forth in the appendix:

United States Constitution, Fourth Amendment.

STATEMENT OF FACTS

James Platts, a drug dealer, turned himself into agents of the Drug Enforcement Administration because he believed he was about to be arrested. After agreeing to cooperate, Platts had a series of telephone conversations with petitioner James Dowell in which Platts agreed to provide a buyer for a quantity of cocaine.

On March 12, 1982, Dowell called Platts and advised that he had checked into the Budgetel Motel in Harvey, Illinois. Dowell told Platts that the transaction could be completed at Platt's convenience and that Platts could pick-up the cocaine or bring his buyer to the area.

Platts and government agents met in a nearby parking lot. Platts was instructed to go to the motel room and determine who was in the room and whether any cocaine was in the room. Platts was to return immediately and report to the agents.

Platts went to the room where he was greeted by Dowell and co-defendant Larry Luther Brown. Dowell produced a shaving kit from which Platts took a plastic bag containing cocaine. Platts and Brown indulged in the drug and the bag of cocaine was replaced in the shaving kit.

Platts advised that his buyer was in a nearby hotel. Dowell offered the use of the room to complete the transaction. Platts

then left the room on the excuse that he was going to the lobby to call his buyer.

Platts had spent approximately twenty minutes in the room and several more searching the lobby for the agent. The agent noted Platts condition and Platts admitted using cocaine. The agent instructed Platts to go back to the room and to call the lobby when he got there.

Platts went to the room but did not call the lobby immediately because he was again indulging in the cocaine. Meanwhile, the agents gathered in the lobby and requested that a security guard accompany them with a key to the room. Within fifteen minutes of Platts' departure from the lobby, the agents entered the room and arrested Dowell and Brown. In a search of the room the shaving kit containing the cocaine was seized.

The court below affirmed the petitioner's conviction and held that the warrantless entry into the room was permissible because the agents, based on the inherent dangerous situation the informer was in, were justified in their apprehension for his safety.

REASONS FOR GRANTING THE WRIT

It is a cardinal principle that searches conducted without prior judicial approval are per se unreasonable and are violative of the Fourth Amendment except for a few well established exceptions. *Katz* v. *United States*, 389 U.S. 347 (1967); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976); *Vale* v. *Louisana*, 399 U.S. 30 (1970). One such exception authorized entry into a dwelling place without judicial approval because of some exigent circumstance. *Payton* v. *New York*, 455 U.S. 573 (1980); *Steagold* v. *United States*, 451 U.S. 204 (1981); *United States* v. *Johnson*, 457 U.S. 537 (1982). The Fourth Amendment protection prohibiting entry without judicial approval or an exigency applies equally to a motel room as it does to a more

permanent dwelling place. *Stoner* v. *California*, 376 U.S. 483 (1964); *Johnson* v. *United States*, 333 U.S. 10 (1948).

One recognized exigency justifying a warrantless entry into a dwelling is the reasonable belief that someone within is in need of immediate assistance. *Mincey* v. *Arizona*, 437 U.S. 385 (1978). Once lawfully inside the dwelling, officers may seize evidence discovered in plain view. *Michigan* v. *Tylor*, 436 U.S. 49 (1978); *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

An objective test of whether the facts available to the officers at the time of entry would cause a reasonable man to believe that entry was necessary must be applied in determining whether the entry was justified. *Mincey* v. *Arizona, supra; Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Donavan*,, 485 F.2d 201 (6th Cir. 1973); *Root* v. *Gauper*, 438 F.2d 361 (8th Cir. 1971).

The principles stated above are well settled. However, the application of these principles in deciding whether an entry was warranted has evolved from the truly emergency situations such as screams heard by officers. *United States* v. *Barone*, 330 F.2d 543 (2d Cir. 1964). This evolution has progressed, as evidenced by the opinion below, toward the adoption of a per se finding that a drug transaction is an inherently dangerous situation justifying the warrantless entry into a dwelling place. *United States* v. *Bradley*, 455 F.2d 1181 (1st Cir. 1972); *United States* v. *Williams*, 633 F.2d 742 (9th Cir. 1980); *United States* v. *Kunkler*, 679 F.2d 187 (9th Cir. 1982). The court below specifically adopted such a per se finding:

> This was a drug deal involving several hundred grams of cocaine and tens of thousands of dollars. The results of betrayal were severe and the consequences of Platts' exposure potentially gruesome. The position of Platts was inherently dangerous and his failure to telephone Irwin together with his state of impaired mental agility gave Irwin sufficient reason to fear for Platts' immediate safety.

In fact, the informer here, acting as a government agent, caused any reason for apprehension that may have existed because he was using cocaine rather than making the call he was instructed to make. *Cf. Sherman* v. *United States*, 356 U.S. 369 (1958).

Any per se rule that a particular situation justifies dispensing with the general Fourth Amendment requirement of a judicially approved warrant is contrary to the many decisions of this Court holding that warrantless entries are per se unreasonable. This Court should grant the petition here to decide whether the lower courts can rely upon such per se findings in upholding warrantless entries into dwelling places.

CONCLUSION

For the reasons discussed above, this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the court's judgment in the instant case.

Respectfully submitted,

RICHARD F. WALSH
Room 1220
53 West Jackson Blvd.
Chicago, Illinois 60604
312-427-6050
Attorney for Petitioner

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 83-1061 and 83-1316

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES DOWELL and LUTHER LARRY BROWN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 82 CR 169-1 and 82 CR 169-2—Thomas R. McMillen, *Judge.*

ARGUED SEPTEMBER 15, 1983—DECIDED JANUARY 9, 1984

Before PELL and CUDAHY, *Circuit Judges*, and GRANT, *Senior District Judge.**

PELL, *Circuit Judge.* On March 12, 1982, agents of the Drug Enforcement Administration (DEA) entered appellants' hotel room without a warrant and seized approximately 700 grams of cocaine later used to convict appellants of several offenses relating to the possession of the controlled substance. Appellant Dowell received a three-year prison sentence to be followed by a five-year

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* Robert A. Grant, Senior District Judge of the Northern District of Indiana, sitting by designation.

period of special mandatory parole, and appellant Brown received a four-year prison term to be followed by parole of the same type and duration. Appellants raise only one issue on appeal. They contend that the trial court should have suppressed the drug evidence used against them because the DEA seized it pursuant to a warrantless entry. The Government responds that the warrantless entry was justified by exigent circumstances. For the reasons stated below, we affirm appellants' convictions.

I. Facts

In February 1982, James Platts, fearing imminent arrest for his activity as a drug trafficker, made contact with the offices of the DEA in Chicago and agreed to cooperate in a plan to gather evidence against suspected drug suppliers James Dowell and Luther Larry Brown, two men with whom Platts had had prior dealings. On February 26, DEA agent Bob Irwin directed Platts to finalize plans for a $42,000 drug deal with Dowell. According to the plan, Dowell was personally to transport approximately 700 grams of cocaine from Florida to Chicago, where Platts was to act as a middleman in a further "sale" to an outside buyer.

On March 12, 1982, Dowell arrived in Chicago and registered along with appellant Brown at the Budgetel Motel in South Holland, Illinois. At about 9:00 p.m. on that day, Dowell telephoned Platts to report his arrival and Platts requested a meeting at the Budgetel with Dowell and the outside buyer to transact the deal and display the cocaine to his buyer. Agent Irwin apparently was to pose as the outside buyer and personally garner evidence against Dowell. Dowell initially approved of the meeting, but later suggested that Platts take his buyer to some location near the Budgetel. Platts agreed to have his buyer rent a hotel room in the area. Apparently, Platts intended to invite Irwin, posing as the outside buyer, to the meeting once it was underway.

Irwin and Platts proceeded to South Holland and telephoned Dowell from the lobby of the local Sheraton Hotel. Dowell instructed Platts to come to room 248 at the Budgetel and purchase the cocaine. Irwin testified that he stayed in the lobby of the Budgetel and instructed Platts to enter room 248, find out who was in the room, see if there were narcotics or weapons there and then return to the lobby under the pretext of needing to consult his outside buyer. According to Irwin, Platts was apprehensive about being exposed as an informant.

Platts entered room 248 where he found Dowell and Brown. Dowell went into the adjoining room and returned with a vinyl shaving kit which he handed to Platts. Platts opened it and took out a plastic bag containing the cocaine. Platts inspected the cocaine, tested it and then Brown and he snorted several sample doses. Dowell then took the bag back, replaced it in the vinyl shaving kit and placed the kit on the bed in room 248. After remaining in the room approximately fifteen to twenty minutes, Platts told Brown and Dowell he had to return to the lobby to telephone his buyer.

Platts found Irwin in the lobby after several minutes of searching. Irwin learned that Dowell and Brown both were present and that they had the cocaine with them. Irwin also learned, counter to all expectations, that Platts had ingested cocaine and was experiencing the drug's effect. According to Irwin, Platts was agitated and fearful that Dowell and Brown would interpret his further absence as evidence of betrayal. Irwin also testified that Platts told him during this lobby conversation that Brown would likely have a gun. Platts testified that he could not recall making such a statement. After debriefing Platts, Irwin had Platts copy down the number of the pay phone in the Budgetel lobby and return to room 248, from where he was immediately to place a call and obtain further instructions. Platts reentered room 248 and told Dowell that he spoke with his buyer and that the buyer was counting his money. Platts delayed calling Irwin because he did not want to awaken suspicion. Meanwhile, Irwin had

gathered several agents in the lobby and awaited Platts' call. After fifteen to twenty minutes, when no call was forthcoming, Irwin had a motel security guard unlock the doors to room 248 and adjoining room 246. The DEA agents entered both rooms and apprehended Dowell and Brown as they fled from room 248 to room 246. Inside room 248, the unzippered shaving kit with a plastic bag protruding from the top was on the bed. Irwin performed a field test on the white powder in the plastic bag and confirmed it was cocaine. Later Irwin told Platts he ordered the raid because he feared for Platts' immediate safety.

After the indictment issued, appellants moved to suppress the evidence seized pursuant to the warrantless entry. The motions were referred to a United States magistrate for a hearing. The magistrate recommended to the district judge that the motions be denied because the warrantless entry was justified by exigent circumstances. The district judge adopted the magistrate's recommendation, and both appellants were subsequently convicted at jury trial.

II. Discussion

The exigent circumstances doctrine is an exception to the Fourth Amendment's protection against searches conducted without prior approval by a judge or magistrate. The doctrine recognizes that "warrantless entry by criminal law enforcement officials may be legal when there is a compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). The doctrine has been applied where law enforcement agents fear imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 39-40 (1963), escape of a suspect, *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967), and grave danger to their lives or the lives of others, *id.* Since the doctrine is an exception to the ordinary Fourth Amendment warrant requirement, the Government has the burden of showing that the warrantless entry fits within

the exception. *United States v. Jeffers*, 342 U.S. 48, 51 (1951). Moreover, this court maintains that law enforcement officials may not deliberately wait for exigent circumstances to arise and then exploit the exception to justify warrantless entry. *United States v. Berkwitt*, 619 F.2d 649, 654 (7th Cir. 1980). Finally, in applying the doctrine, an objective standard governs the reasonableness of law enforcement officials' belief that exigent circumstances have arisen. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971).

Appellants argue that there is an insufficient factual basis in this case to support finding exigent circumstances. The magistrate and the district judge relied on four principal facts to find exigent circumstances. First, Platts' role as undercover informant was potentially subject to exposure. Second, Platts failed to follow his instruction to telephone immediately after returning to room 248. Third, Platts was under the influence of cocaine. Fourth, it was likely that there were guns in the room. The first three facts are firmly established in the record. The fourth fact is not as well established. Although Irwin testified that Platts revealed to him the presence of guns in the room during their lobby conversation, Platts testified he could not recall any discussion in the lobby concerning guns. Appellants argue that the magistrate mechanically adopted Irwin's version of what transpired in the lobby and that reliance on the fourth fact casts doubt on the finding of exigent circumstances.

Appellants' argument fails for two reasons. First, the district judge made a de novo review of the magistrate's determination and also concluded that Irwin was more credible than Platts. Absent inherent improbability, this court will not disturb the district court's finding on the credibility issue. *See United States v. Grabiec*, 563 F.2d 313 (7th Cir. 1977). Second, reliance on the fourth fact is not vital; we believe that the first three facts taken alone would lead a man of reasonable caution to conclude that entry without delay was essential. This was a drug deal involving several hundred grams of cocaine and tens

of thousands of dollars. The results of betrayal were severe and the consequences of Platts' exposure potentially gruesome. The position of Platts was inherently dangerous, and his failure to telephone Irwin together with his state of impaired mental agility gave Irwin sufficient reason to fear for Platts' immediate safety.[1]

The Eighth Circuit recently faced a case bearing factual similarity to the instant case. In *United States v. Williams*, 633 F.2d 742 (1980), the DEA provided an informant with fake cocaine, which she was to sell to a drug trafficker at a public airport; DEA agents monitoring the scene intended to arrest the trafficker when he exchanged his money for the fake cocaine. The trafficker, however, was unwilling to complete the sale until he tested the "cocaine" at a location distant from the airport. The informant, seeking to avoid suspicion, agreed to drive off with the trafficker to defendant's house. The DEA was unprepared for this turn of events, which left the informant in an unmonitored setting where she ran a substantial risk of exposure. DEA agents later located the informant's car adjacent to defendant's house and entered the house without securing a warrant. The Eighth Circuit found the entry justified because of the risk of exposure and the prior violence of the drug trafficker. We agree with the Eighth Circuit's analysis and find that the danger to the informant in the instant case appeared even more acute because his promised telephone call failed to materialize.

Appellants do not claim, and we do not find that the DEA deliberately waited for dangerous circumstances to arise or otherwise exploited the exigent circumstances ex-

[1] Counsel for appellants stated in oral argument that there are established procedures in the involved jurisdiction which enable law enforcement officials to obtain a warrant by telephone when circumstances do not permit a formal appearance. In light of the pressing need for rapid action in this case, the failure to attempt to obtain a telephone warrant is not sufficient to take the entry out of the exigent circumstances exception, although the availability of a telephone warrant is a factor to be weighed.

ception. Accordingly, the warrantless entry into the hotel room did not constitute a Fourth Amendment violation. Since the entry was within constitutional bounds, the DEA agents lawfully seized the cocaine, which lay in open view on the motel room bed. *See Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971).

CONCLUSION

Having considered all the arguments urged by the parties to this appeal, we conclude that the motion to suppress use of the cocaine as evidence at trial was properly denied, and appellant's convictions accordingly are

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

United States of America, *Plaintiff*, v. James Dowell and Luther Larry Brown, *Defendants.*	No. 82 CR 169-1 & 82 CR 169-2

DECISION ON OBJECTIONS TO MAGISTRATE'S REPORTS

By a report dated June 4, 1982, the magistrate acted upon the defendants' pretrial motions relating to discovery and return of property. Her decisions on discovery matters are unassailable unless "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)-(a)(A). Defendant Dowell filed objections to this report on June 15, 1982 which we find to be of no substance, with the exception that the government should file a bill of particulars specifying whether the conspiracies alleged in Counts 2 and 3 of the Indictment are the same as those alleged in Count 1. The magistrate apparently so found at the top of page 3 of her report dated June 4, 1982.

The other rulings of the magistrate with respect to discovery matters are adopted by the court. Although most of the discovery requests were either complied with voluntarily by the government or denied by the magistrate, some affirmative action is required by the magistrate's report. The court will require the government to report such compliance prior to trial.

The magistrate did not rule on the issue of recordings which were made of conversations between the government's

informant and a defendant. This motion has been withdrawn, apparently because the recordings were consensual. *United States* v. *Horton*, 601 F.2d 319 (7th Cir. 1979). If the conversations are to be played for the benefit of the jury, the court will also make a preliminary determination of the existence of a conspiracy and will give an interim instruction to the jury concerning the use of the statements against an alleged co-conspirator. We believe that such a determination can be made by the court on the evidence which will have been presented to the jury by that time, thereby avoiding a pretrial hearing on the question of the existence of a conspiracy. *United States* v. *Allen*, 596 F.2d 227, 230 (7th Cir. 1979), *cert. den*, 444 U.S. 871 (1979).

On August 10, 1982, after hearing evidence, the magistrate issued a second report and recommendations on the motions to suppress. Defendant Dowell filed objections on August 23, 1982 and the government filed objections to one portion of the report on August 20, 1982.

The government's objection relates to the magistrate's order that it return $2,880 which were taken from defendant Dowell's suitcase. The objection is based upon the contention that this money had been administratively forfeited before the defendant filed a motion for its return. This contention is erroneous as a matter of fact, because the forfeiture had not been completed until after defendant filed his motion. He therefore had a right to a decision from the magistrate and from this court under Rule 41(e), and the decision of the magistrate in his favor is correct. *Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974), *cert. den*, 419 U.S. 1069 (1974). The government has returned the truck and firearm taken from Dowell at the time of his arrest.

Therefore, only the motion to suppress the contraband cocaine seized in Room 248 of the Budgetel Motel remains to be reviewed. We find and conclude that the entry by the government agents into this motel room without a warrant was justified by the exigent circumstances which had arisen, making

it impracticable to obtain a warrant. *Michigan* v. *Tyler*, 436 U.S. 499, 509-11 (1978); see also *United States* v. *Watson*, 423 U.S. 411 (1976).

The magistrate's report and recommendations dated August 10, 1982 are unusually detailed and persuasive in this respect.

One must consider the agent's state of mind immediately prior to making an unauthorized entry into a motel room. He knew that two individuals were in the room in the possession of a substantial quantity of cocaine which they wished to sell. He also had reason to believe that one or more of them might be armed. His informant was apparently taking liberal samples of the cocaine while he was in the motel room and did not make the scheduled telephone call out of the room on his second visit. We think it would be an unreasonable requirement under all these circumstances to expect the government agent to obtain a search warrant at approximately 11:00 o'clock p.m. from a judge or a magistrate who was probably a distance of one-half hour's travel from the scene.

We are cognizant of the general principle that issues of credibility on motions to suppress should not be irrevocably delegated to magistrates and that this court must make a *de novo* review of the magistrate's recommendations on such motions. On the other hand, magistrates do have the authority to take evidence and make recommendations on motions of this kind, and it would be an unnecessary duplication of judicial efforts for us to hold an evidentiary hearing on the same issues and with the same witnesses who were heard by the magistrate unless there is reason to believe that the magistrate improperly evaluated the testimony.

The magistrate alluded to a conflict in the testimony of the informant and the government agent on the question of whether the defendants were armed. We do not believe this inconsistency is particularly significant, because the agent had

independent grounds for believing the defendants were armed based on prior experience and knew that the informant had previously carried a weapon to protect himself against the defendants. It is what the agent reasonably believed and not what the informant says he told him which is significant, and the magistrate's acceptance of the agent's version of this fact is completely reasonable. The recommendations of the magistrate on page 8 of her report dated August 10, 1982 are adopted by the court. *United States* v. *Williams,* 633 F.2d 742 (8th Cir. 1980) and *United States* v. *Acevedo,* 627 F.2d 68 (7th Cir. 1980).

We further agree with the magistrate's conclusions that this was not a consensual entry and that defendant Dowell had standing to suppress, as well as does Brown. We might point out, in this connection, that the two defendants were using Room 246 and 248 more or less interchangeably, but that both rooms were not the equivalent of "private homes" since they could be readily entered by anyone who had possession of a pass key, such as the night clerk. Neither party has discussed the distinction between temporarily rented motel rooms and private residences *vis-a-vis* the Fourth Amendment, but we are inclined to believe that they are somewhat more analogous to automobiles than to private residences, insofar as a reasonable expectation of privacy is involved.

Defendants further contend that the cocaine was not in plain view, citing page 101 of the transcript. However, Agent Irwin testified that he could see that the shaving kit was unzipped, that it contained a plastic bag, and that both the bag and the kit were open so that he could see a white powder in the bag. We fail to find any evidence cited by defendants in their objections that the cocaine was not in plain view. The magistrate's findings therefore at the top of page 10 of her report are clearly correct and the seizure of the contraband was lawful, assuming, as we do, that the entry into the room was also lawful.

The court therefore adopts the recommendations contained on page 13 of the magistrate's report for the reasons and with the amplifications stated above.

This case will be called on Monday, September 27, 1982 at 2:00 p.m. for status and to be set for trial.

ENTER:

/s/ THOMAS R. MCMILLEN
Thomas R. McMillen
Judge, U. S. District Court

DATED: Sept. 17, 1982

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

United States of America *v.* James Dowell and Luther Larry Brown	82 CR 169

To: The HONORABLE THOMAS R. McMILLEN, Judge,
United States District Court

REPORT AND RECOMMENDATIONS OF MAGISTRATE OLGA JURCO

Defendants are charged with dealing in cocaine. Approximately 700 grams of the drug were seized on March 12, 1982 when defendants were arrested by the Drug Enforcement Administration in Room 248 of the Budgetel Motel registered to defendant Brown.

The standing of defendant Dowell to suppress the contraband evidence has been challenged by the government. Defendant Dowell had been registered to Room 246. In addition, the defendant Dowell has moved for reconsideration of denial of his motion under Rule 41 for the return of $2880.00 taken from his luggage in Room 248. The denial had been premised on administrative completion of forfeiture. Ruling and consideration of these motions will be dealt with later in this Report and Recommendation.

Defendants moved to suppress seizure of the cocaine and to suppress statements made after arrest. Basic to the decision on the motion to suppress use of the contraband as evidence is resolution of whether the entry and seizure by Drug Enforce-

ment Administration agents was in violation of constitutional rights. The arrests of defendants and the seizure of the cocaine and other property were without an arrest warrant, *Payton v. New York*, 445 U.S. 573 (1980), or search warrant, *Chimel v. California*, 395 U.S. 752 (1969); *Ker v. California*, 374 U.S. 23 (1963). The entry was made without first knocking and announcing identity or purpose. *Sabbath v. United States*, 391 U.S. 585 (1968). It is not argued that the same degree of protection does not exist because a hotel room as distinguished from a home was involved. It is the government's burden to show justification for a warrantless entry and it contends that exigent circumstances existed requiring the warrantless entry by agents. The government's statement of facts in its post-hearing brief pp. 1-7 is substantially accurate.

On February 8, 1982, Platts came to the DEA office; he told Agent Irwin that he was involved in the distribution of cocaine and marihuana; that three suitcases had arrived at O'Hare from Florida and one of these, a yellow suitcase, contained some cocaine which Platts had brought from Florida, given to him by Mr. Dowell; that he did not claim the luggage because he thought DEA was "onto him." Platts returned to the DEA office the next day because he thought the yellow suitcase, which was under an assumed name, might be picked up by someone else. Agent Irwin later that day claimed the luggage. The following day Platts opened the yellow suitcase in the DEA office and retrieved a clear plastic bag containing approximately 650 grams of cocaine.

Agent Irwin, through Platts, who agreed to cooperate, initiated an inquiry to Dowell for the purchase of a large quantity of cocaine. On February 16 and on February 26 arrangements were made through Platts in telephone conversations with Dowell, recorded with Platts' consent, respecting the price and delivery of cocaine to the Chicago area. Platts met Dowell at the Hinsdale Oasis on February 26 to pay Dowell money on a debt he owed Dowell on prior deals and for a

sample of cocaine for the putative purchase. In a recorded telephone conversation of March 9 initiated by Platts, Dowell stated the contraband would be brought sometime during the night. Agent Irwin and other agents set up surveillance March 9 at O'Hare Airport of all flights coming from Florida, giving the surveillance agents the description of Larry Brown as related to him by Platts who thought Brown would deliver the cocaine. However, on March 10 Dowell called Platts to say he was enroute and there was a possibility that Dowell or Larry might fly out of Atlanta. On March 11 Dowell called Platt again stating he would arrive noon March 11. Platt asked Dowell whether he was bringing the cocaine, the price, and was told it was 700 grams and the price was $42,000. Platt indicated he could get $53,000 and could give Dowell $8000 or $9000 on a $100,000 or $131,000 debt he owed Dowell on prior dealings. That conversation was tape-recorded (GX 6B). On March 12 around 7 AM, Dowell called Platts that he was still enroute and would be in touch with him in the early evening. Platts received a call from Dowell at about 9 PM and was checking into the Budgetel Motel, that Platt could pick up the cocaine or bring his buyer. Platts replied he would come down there. That conversation was tape-recorded (GX 7B).

Agent Irwin and Platts drove separately to another meeting point with other agents in the near vicinity of the Budgetel Motel. Thereafter, Agent Irwin, with Platts driving, proceeded to the Sheraton Hotel, where at around 10:30 PM Platts called the Budgetel Motel asking for James Dowell's room. He spoke to Dowell who told him to come to Room 246; and then Dowell changed it to Room 248. The conversation was overheard by Agent Irwin. Approximately 15 minutes later, Agent Irwin and Platts proceeded to the Budgetel Motel. During that trip, Agent Irwin told Platts he was to go in, see what was in the room, return to Agent Irwin to report, and to allay Platts' concern, stated that if an arrest became necessary he would also be arrested. Platts went in the back entrance of the motel to Room 248, knocked on the door and was admitted by defendant

Dowell. In the room with Dowell was Larry Brown. Dowell briefly left Room 248 to go into the adjoining room and returned with a brown shaving case which he opened and passed a plastic bag to Platts who opened it, smelled it, tasted it and "snorted" some of the cocaine. Brown also took some. Platts left the room about 15 to 20 minutes later, using the excuse that he was going to call his buyer from the lobby phone to bring the money.

Agent Irwin had become concerned because of the "long" delay in Platts' return. Platts eventually met Agent Irwin in the lobby by the pay phone as arranged. On inquiry, Platts said everything was OK; that Larry was there, Dowell was there, and the cocaine was in the room. Agent Irwin testified that Platts was "very agitated" and anxious to get back to the room because he felt nervous about being away in that they would start interpreting his delayed return to the room as being a double-cross or something (Irwin 70, Platts 179-181B). Platts admitted he was nervous because he didn't know if there was anyone else involved in the deal in the area and snorting cocaine made him a little uneasy, nervous, giving him a light euphoric effect. Agent Irwin asked Platts whether he was high on cocaine and Platts said he had taken some. To Agent Irwin, that was an unexpected occurrence. However, he instructed Platts to return to the room to be certain Brown and Dowell and the cocaine were still there and immediately call him from the pay phone in the hallway of the motel to let Irwin know he was all right. Platts wrote the number of the telephone on a match cover and put it in his pocket. Agent Irwin relayed information to the other agents that the cocaine was in the room and waited for the call from Platts; he waited for 15 or 20 minutes.

When no call was made, Agent Irwin made his identity known to the night clerk and asked for passkeys to Rooms 246 and 248. A security guard accompanied the five agents and Agent Irwin, and used the keys to these rooms to unlock the doors. Agent Irwin opened the door to Room 246, entered with other officers; no announcement of identify or purpose was

made; he had his weapon drawn. Defendants Brown and Dowell were running into Room 246 where they were arrested by Agent Irwin, handcuffed and placed on beds in Room 246. No *Miranda* warnings were given to either defendant by the agents. Agent Duckhorn and other agents simultaneously entered Room 248, found Platts, arrested him.

Subsequent to the arrests, Platts stated he had not called Irwin because he was trying to make the deal go as smoothly as possible and he didn't want to rush things. On his return to Room 248, he again took some more of the cocaine which was on the bed. He had been in the room about 20 minutes when the agents entered. Agent Irwin later told him he was worried about his safety and that is why they came in so early.

Defendants contended that the fact that Agent Irwin permitted Platts to return to Room 248, knowing that Platts had used cocaine, cannot be reconciled with his fear that by not receiving the later call from Platts, and by the time a warrant could be obtained, he "might go in there and find Platts dead" (Irwin 131). Agent Irwin testified that before Platts went into the room he said there would be guns there and Irwin assured him that if it was necessary to make an arrest, they would appear to arrest him also (Irwin 66, 90); that Platts said Mr. Brown would have a weapon (Irwin 91, 92, 117). Platts had no recollection of telling Agent Irwin during the lobby conversation anything with respect to Mr. Brown and weapons (Platts 181C, 181E) and testified he did not inform Agent Irwin that Brown would probably have a weapon (181B). The testimony of both Irwin and Platts shows that Platts, on a prior occasion known to Agent Irwin, met two of Dowell's people, Cosgrove and Dino, in Bolingbrook. Unbeknownst to Agent Irwin, who was on surveillance, Platts carried a firearm; he told Irwin he carried a weapon because he was afraid because some of Dowell's people carried weapons sometimes and was in fear of his safety (Plats 181B-E, 213). He further had told Agent Irwin on February 8th and 9th that Brown was a former police officer from whom he had purchased cocaine.

Agent Irwin testified it was his plan, after he received Platts' call, to enter Room 248 as the ostensible buyer for the 700 grams. He admitted that he had no "flashroll" to pay for it; he intended to postpone the completion of the transaction to the next day to make arrangements for the money; that he would make efforts to persuade Dowell and Brown to postpone the transaction. Defendants construe this as being another element to be considered negatively in weighing the concern he expressed for Platts' safety, particularly after he instructed Platts to return, knowing he had ingested cocaine.

This testimony must also be considered as to the existence of intent to enter Room 248 for the sole purpose of arresting and seizing the evidence. Agent Irwin had sufficient probable cause to arrest following his meeting in the lobby with Platts. He intended to carry through on his role as buyer. The failure of Platts to call, his earlier cocaine use in Room 248, the previous information in February given to Agent Irwin of his fear of Dowell's people, and the credibility to be given to testimony of the lobby conversation between Platts and Agent Irwin are critical to the reasonability of the judgment exercised by Agent Irwin to enter Room 248. It is to be noted that Agent Irwin, after the arrests, expressed to Platts his grave concern for his safety. These circumstances resulted in the drug agents entering without prior notice of authority and purpose required, *Sabbath* v. *United States, supra,* and the ensuing property and evidence seizures. *Ker* v. *California, supra.* The interpretation of the objective facts concidedly raise a close question. Discussed by Justice Powell, in his concurring opinion in *United States* v. *Watson,* 423 U.S. 411(1976) is the dilemma facing arresting officers:

> "* * * Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury. Under the holding of the Court of Appeals such additional

> investigative work could imperil the entire prosecution. Should the officers fail to obtain a warrant initially, and later be required by unforeseen circumstances to arrest immediately with no chance to procure a last-minute warrant, they would risk a court decision that the subsequent exigency did not excuse their failure to get a warrant in the interim since they first developed probable cause. If the officers attempted to meet such a contingency by procuring a warrant as soon as they had probable cause and then merely held it during their subsequent investigation, they would risk a court decision that the warrant had grown stale by the time it was used. Law enforcement personnel caught in this squeeze could ensure validity of their arrests only by obtaining a warrant and arresting as soon as probable cause existed, thereby foreclosing the possibility of gathering vital additional evidence from the suspect's continued actions. * * *"

Delay in seeking an arrest or search warrant, even when known contraband was in Room 248, does not negate possibility of subsequent exigent circumstances requiring warrantless entry. Dowell, according to Platts, was a dealer in narcotics. Agent Irwin believed, on information from Platts, that there might be weapons in the room. Not only was it believed Platts was in danger, but it must be considered that such probability posed a risk to law enforcement agents. I would conclude that Agent Irwin's actions was not based on unfounded fear and belief of imminent danger to Platts. The exigency and emergency was neither created by the arresting officers, nor was entry made for the sole purpose of arresting the defendants. I would recommend to the Court that a finding be made that the testimony of Agent Irwin as to the lobby conversation is more believable than that of Platts. In balancing the objective facts, I would recommend to the Court that it find there was reasonable grounds for the belief of Agent Irwin that there was an immediate need for agents' assistance for protection of life and that risk of harm to Platts was imminent if agents delayed until an arrest warrant and search warrant were obtained; that it was not motivated by intent to arrest and seize evidence.

The government alternatively argues that the entry should be equated to a consensual entry under the authority of *United States v. White,* 660 F.2d 1178 (7th Cir. 1981). It contends that the defendants' consensual entry of Platts into Room 248 on the first and second occasion make unnecessary a determination of the legality of the later entry of the agents because Platts was still in Room 248. Therefore, their entry was not a separate intrustion of constitutional dimension because Platts was acting in the capacity of the government's agent. This argument is not persuasive and is not accepted.

Defendant Brown argues that basis for an arrest warrant for Dowell existed on February 26 when he met Platts at the Hinsdale Oasis and a transfer of 65½ grams of marihuana was made under the surveillance of Agent Irwin. It is urged a warrant of arrest should have been requested at that time. Such a contention was considered and rejected in *United States v. Salmasian,* 515 F.Supp. 690 (D. Md. 1891). District Judge Elfin stated at p. 689:

> " * * * requiring a warrant as to the earlier-committed crimes would seriously interfere with a legitimate police inquiry without any countervailing justification. Once a warrant would have been obtained, there would have been a positive duty on the government to execute the same promptly; where, as here, it is believed that the person named in the warrant may shortly commit additional and more serious crimes than those able to be listed in the warrant and is under surveillance for the same, this requirement of promptness might well force the police either to abandon prosecution of the already-committed crimes or to move in prematurely and destroy any hopes of prosecution of the prospective crimes. * * * "

Having recommended a finding that the no knock-no announcement entry was made under *rapidly-arisen exigent circumstances,* the legality of the search must be addressed. If the entry was within constitutional bounds, seizure of property

in open view involves no invasion of privacy and is presumptively reasonable where there is probable cause to associate the property with criminal activity. *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Watson, supra.* The facts with regard to the packet of cocaine show it was in open view. The shaving kit was lying on the top of the bed in Room 248; the kit was open; the plastic container with cocaine was visible and open. Platts' testimony was that the kit and container, which he had opened, was on the bed just before the entry effected by DEA agents. Scope of search incident to arrest as delineated in *Chimel v. United States, supra,* is not here applicable. Whenever an officer makes usual observation of contraband from a vantage point he rightfully occupies, he has not made an illegal search within the Fourth Amendment since one who placed an object in plain view has not exhibited actual or subjective expectation of privacy in the object. The seizure of the cocaine was lawful under the open view doctrine.

The standing of Dowell to suppress seizure of the contraband is next considered. The burden rests on one who seeks to suppress to prove his legitimate expectation of privacy has been violated. From all the evidence relating to the registration of Room 246 to Dowell and Room 248 to Brown, their request for adjoining rooms, the pass-key to the door between the rooms, the fact that after the arrests all the luggage was in Room 246, that Platts met Dowell in Room 248 and that Dowell went into Room 246 and returned with the shaving kit to Room 248, I conclude that Dowell and Brown had equal interest in Room 248, and that both defendants Brown and Dowell intended to use Room 248 as their place to transact business with Platts and/or his buyer. Standing does not depend on property rights in the invaded place; it is whether the area was one where there was reasonable expectation of privacy. Dowell had expectation of privacy in Room 248. Therefore, Dowell has standing to move to suppress the cocaine.

Next for consideration is Dowell's motion for return of property and the motion of both defendants for suppression of the tape recordings. The defendant Dowell's motions for return of truck and firearm taken from him following arrest on March 12, 1982 has been mooted because the government has returned these articles to defendant Dowell. The defendants have withdrawn their motions to suppress use of recorded telephone conversations between Platts and Dowell conceding that Platts was acting as an informant of the government at the time of their recording.

There remains the issue of the seizure of $2880 from Dowell's luggage in Room 246. In this respect, the application of the principles of search incident to arrest set forth in *Chimel, supra,* are to be weighed. *Arkansas v. Sanders,* 442 U.S. 753. Also to be considered are the motions of Brown and Dowell when, without *Miranda* warning, each, when asked, identified their "open" luggage and Brown's answer to Agent Irwin's question.

Agent Irwin and other agents entered into Room 248 under previously found exigent circumstances. Agent Irwin testified that after arresting and handcuffing Brown and Dowell, who were entering Room 248 from Room 246, and placing them face down on the beds in that room, he went into Room 246, saw the contraband on the bed and field tested it. On returning from Room 248 to Room 246, he testified three pieces of luggage were open, but he did not know who, when and how the luggage was opened. One of the officers showed him a shaving kit which had come from Dowell's luggage. This contained the currency. In Brown's luggage was found additional cocaine. There is no evidence presented by the government from which to conclude that, other than the luggage of the female occupant of Room 248, the luggage of Brown and Dowell was open at the time of Agent Irwin's and other agents' entry. *Chimel* establishes that protective searches incident to

arrest are essential. It does not, however, sanction opening of closed luggage. *Chimel* articulated the standards by which searches incident to arrest must be measured.

> "[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment of destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> "There is no comparable justification, however, for routinely searching rooms other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."

I would recommend the Court find that the seizure of currency belonging to Mr. Dowell was beyond the scope of *Chimel*. The order previously entered is vacated.

Defendant Brown moves to suppress an incriminating statement that additional white powder found in his luggage was cocaine because it was elicited from him by questions of Agent Irwin; that neither Agent Irwin nor any other agent had advised him of his *Miranda* rights. It is also contended that they were asked by Agent Irwin to identify which of the luggage seized belonged to them. The agents' testimony is that no *Miranda* warnings were given to Dowell and Brown at the time of their arrests in Room 248. Statements of Brown and Dowell identifying luggage and Brown's response to questioning were a violation of the precepts of *Miranda v. Arizona*, 384 U.S. 436 (1966). The defendants' motions should be granted.

It is recommended the Court find:

1. The testimony of Platts and Agent Irwin establishes that probable cause existed to believe that crime was about to be committed or was being committed by defendants Dowell and Brown in Room 248, Budgetel Motel.

2. The agents' entry into Rooms 246 and 248 of the Budgetel Motel without notice of identity or purpose was based on reasonable belief of a substantial risk of harm occurring to their cooperating individual, Platts. The testimony of Agent Irwin as to probable presence of weapons in Room 248 is more credible than that of Platts, the cooperating individual.

3. Emergency and exigent circumstances justified warrantless entry without an arrest and/or search warrant.

4. The defendant Dowell has standing to move to suppress the seized cocaine.

5. The 700 grams of cocaine was legitimately seized, being in plain view. The facts with regard to the packet of cocaine show it was in open view. The shaving kit was lying on the top of the bed in Room 248; the kit was open; the plastic container with cocaine was visible and open.

6. The government has failed to sustain its burden to show that the seizure and search of defendants' luggage was necessary either as a protective sweep to protect the arresting officers or to preserve evidence. The government is directed to return the $2880.00 to defendant Dowell.

7. The agents failed to inform defendants after their arrest of their rights under *Miranda*. The statements of defendants Dowell and Brown in identifying their luggage, and Brown's admission under questioning from Agent Irwin are in violation of their constitutional rights.

It is recommended the Court deny defendants' motion to suppress the use of the cocaine as evidence in this case. It is

recommended the Court grant defendant Dowell's motion for return of the $2880.00. It is recommended the Court grant defendants' motion to suppress any statements of defendants respecting said luggage or the contents.

Parties are given ten (10) days from date hereof, unless otherwise ordered by the Court, to file objections to said Report and Recommendations with the Honorable Thomas R. McMillen.

Respectfully submitted,

/s/ OLGA JURCO
Olga Jurco,
United States Magistrate

August 10, 1982

Attachments:
Hearing Transcript
Post-Hearing Briefs of the Parties
Pretrial Motions of the Parties

cc: Dan K. Webb,
United States Attorney
Attention: AUSA D. C. Bohan
1500 Dirksen Building
Chicago, Illinois 60604

Richard F. Walsh, Esquire
53 West Jackson Boulevard, #1220
Chicago, Illinois 60604

Donald L. Ferguson, Esquire
2915 S.W. 27th Avenue
Miami, Florida 33133

AMENDMENT 4

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affimation, and particularly describing the place to be searched, and the persons or things to be seized.